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No. 91-1835

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In The

# Supreme Court of the United States

October Term, 1991

DOUGLAS M. BIHLER, THOMAS D. KUEHL, PAULA C. MILLER and LISA P. TALLAR-KUEHL,

*Petitioners,*

*vs.*

ALAN D. EISENBERG, Individually and as Trustee and Administrator of the Alan D. Eisenberg, S.C. Pension and Profit Sharing Plan, and as President and Sole Director of Alan D. Eisenberg, S.C.; THE ALAN D. EISENBERG, S.C. PENSION AND PROFIT SHARING PLAN; and ALAN D. EISENBERG, S.C., a Wisconsin Service Corporation,

*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit*

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1000, *et seq.*, ("ERISA") provides that a pension fund participant who has received his or her full benefits under the plan document may receive additional extra-contractual damages for a claim based on allegations of a fiduciary breach in the administration of the plan's benefit eligibility rules.

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## RESPONDENTS' BRIEF IN OPPOSITION

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 956 F.2d 651, and is reprinted in the appendix to the petition for a writ of certiorari.

The order and decision of the United States District Court for the Eastern District of Wisconsin (Stadtmueller, J.) have not been reported. They are reprinted in the appendix to the petition for a writ of certiorari. Other memorandum decisions of the District Court appear as Exhibits 8 through 13 of the appendix to the initial brief of the defendants-appellants/cross-appellees in the Court of Appeals.

## STATEMENT OF JURISDICTION

Petitioners brought this action in the Eastern District of Wisconsin, invoking federal question jurisdiction under 28 U.S.C. § 1331. On August 30, 1990, the District Court entered judgment for the petitioners.

On appeal, the United States Court of Appeals for the Seventh Circuit entered a judgment on February 10, 1992 and amended it on February 19, 1992. This judgment reversed and denied petitioners' request for extra-contractual damages, but remanded the case to the District Court on other issues.

Petitioners have invoked the jurisdiction of this Court under 28 U.S.C. § 1254(1).

## STATEMENT OF THE CASE

Respondent, Alan Eisenberg and petitioner Thomas Kuehl

lawyered together for 12 years (Tr. v. 3, p. 386).[1] For much of that time, Kuehl handled the day-to-day administration of the plan (Tr. v. 3, pp. 407-08; 412-15; v. 5, pp. 685-695).

Kuehl knew that Eisenberg was not well-acquainted with the mechanics of plan administration, because he had to help resolve some issues regarding a different attorney's termination and distribution a few years earlier (App. Ex. 21; App. Ex. 25; Tr. v. 5, p. 692); nevertheless, Kuehl never suggested to Eisenberg that he should expedite distributions to any of the petitioners while he — Kuehl — was still a corporate officer and employee (Tr. v. 4, pp. 556-57).

Moreover, the plan document indicated that distributions for employees who terminated prior to retirement could be made no earlier than the end of the plan year in which they were terminated (App. Ex. 14 ¶¶ 5(a), 7(b), 7(c); App. Ex. 15, ¶ 2.21, 2.24, 7.9; App. Ex. 27). There was a question as to whether the original plan or the amended and restated plan was in effect, because the Internal Revenue Service had not provided the typical determination letter approving it to the outside law firm which handled all of the Eisenberg's firm's pension and benefit work (Tr. v. 3, pp. 344-48). In fact, final approval from the Internal Revenue Service was not received until October 1988, well after the instant lawsuit had been filed in November 1987 (App. Ex. 18).

Kuehl left the Eisenberg firm in August 1986 (App. Ex. 27). Whichever plan was then in effect, he could not receive a distribution earlier than the following July, upon the termination of the plan year in which he had left employment. His departure

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1. Citations to the transcript include volume and page number, and are indicated as "Tr., v. ____, p. ____." Citations to appendix exhibits from the Court of Appeals Record are indicated as App. Ex. ____.

was not on cordial terms. Thereafter, Kuehl solicited retention by several former Eisenberg employees and began a series of demands for pension benefit distributions on their behalf as well as his own, often including in those communications other issues such as problems with former clients and outstanding loans Kuehl had taken from the firm. (*See* App. Exs. 27; 29; 30; 31; 32; 33).

Delays in the distribution were inevitable because of the IRS problem, an issue which was sufficiently confusing so that even Eisenberg's independent pension attorney could not readily identify which version of the plan was in effect or what petitioners' rights to distribution allowed or required (Tr. v. 5 at 749; v. 3, pp. 344-48). Kuehl's poor plan record-keeping (as day-to-day administrator) further complicated the process, and he did not help matters when he rejected Eisenberg's requests for identification of the legal authority pursuant to which the distributions were being sought (App. Exs. 24; 28). Their mutual antagonism notwithstanding, Eisenberg directed payment to Kuehl and his clients within days after the instant litigation was filed (Tr. v. 3, pp. 348-50).

Most of the dollar distributions were completed in January and February of 1988, and a few extra dollars were added to complete final reconciliation of that process in March of that year (App. Exs. 16, 19, 20). As a result, petitioners and the fifth plaintiff received the following payments on the following dates:

| | 1/15/88 | 2/19/88 | 3/7/88 | Total |
|---|---|---|---|---|
| Bassler-Harsch | $ 500 | $ 762.95 | $ 30.19 | $ 1,293.14 |
| Bihler | 2,000 | 3,078.06 | 122.69 | 5,200.75 |
| Kuehl | 21,000 | 13,032.81 | 1,894.76 | 35,927.57 |
| Miller | 2,000 | 2,415.80 | 105.55 | 4,521.35 |
| Tallar-Kuehl | 4,500 | 3,751.98 | 229.91 | 8,481.89 |

*Id.* In addition, the plan offset against Kuehl's balance various loans which he had taken against his plan account (App. Ex. 22; Tr. v. 5, p. 804). This constituted full payment of all benefits due to petitioners.

At trial, the petitioners each offered testimony of how delay in receipt of payment of their benefits allegedly caused them damage. Paula Miller testified that if she had received the funds from the plan earlier she would have paid off credit cards which were accruing 18% interest on the principal balance due (App. Ex. 3 at 4; Tr. v. 3, pp. 303-305). Lisa Tallar-Kuehl testified that delay in payment caused her distribution to be subject to the less favorable provisions of the new Tax Reform Act of 1986 (App. Ex. 3 at 6; Tr. v. 2 at 80). Douglas M. Bihler claimed that delay in payment of benefits due caused him to postpone hiring a secretary for his new law firm (App. Ex. 3 at 5; Tr. v. 2, pp. 115-17). Like his wife, Thomas Kuehl claimed that late distribution caused him to be subject to the new, less favorable tax laws (App. Ex. 3; Tr. v. 4, pp. 510-511). Kathaleen A. Bassler-Harsch offered no evidence of any actual loss resulting from the delay in her distribution (App. Ex. 3 at 11).

The jury awarded $25,000 to Kuehl and $7,500 to each of the other four petitioners upon petitioners' compensatory damage claims (App. Ex. 5). Thereafter, the District Court granted substantial remittitur as to the awards of all of the petitioners but Kuehl, ruling that the awards bore no rational relationship to the evidence (App. Ex. 3). For example, Bassler-Harsch received only $1. Petitioners have never explained why Kuehl should receive this tax advantage when the plan gave him no right to receive payment until after the March 1987 effective date of the Tax Reform Act of 1986. (*See* App. Ex. 14, ¶¶ 5(a), 7(b), 7(c); App. Ex. 15, ¶¶ 2.21, 2.24, 7.9).

On May 11, 1988, in an order denying petitioners' motion to disqualify Judge Stadtmueller, the District Court discussed the realities of this case (App. Ex. 10). Noting the flood of petitioners' motions in the period between the filing of the case and the scheduling conference order, the court stated:

> In my view, these factors unquestionably stem from plaintiffs' counsels' unyielding approach to discovery at the outset. As a consquence, the court found itself cast in the role of referee in what amounted to a children's sandbox spate. (p. 3).

Finding nothing in the record which suggested that it had made any decisions in this case other than upon their merits, the court stated:

> [I]t is difficult to read [plaintiffs' attorney] Mr. Staudenmaier's affidavit as anything more than the product of a badly bruised ego resulting in a fully disguised collateral attack on the wisdom of this court's prior ruling. It plainly is inadequate to support a § 455(a) motion. (p. 5).

The same May 11, 1988 order also denied petitioners' request under Rule 11 that defendant's motion to disqualify their attorney compelled the award of sanctions. *Id.* A week later, by a handwritten letter dated May 18, 1988, counsel for the petitioners cited the court to a newspaper article which allegedly contained "personal shots" at him from the court and further indicated that lawyers who move to disqualify federal judges should not have to risk "being subjected to public calumny from the judge." (App. Ex. 34).

One year later pettitioners sought an injunction prohibiting the plan from distributing assets to the defendant Eisenberg. The

court found that any harm petitioners might suffer was "speculative at best," that petitioners had failed to establish inadequate legal remedies or a danger of irreparable harm, and that the balance of harms clearly favored defendants (App. Ex. 13 at p. 4).

The case now comes down to whether the vexatious and harassing pursuit of extra-contractual remedies, seeking to inflate pension fund distributions which were fully paid years earlier, warrants attorney's fees and other payments. This "sandbox spate" should never have been allowed to get so far out of hand.

## REASONS FOR DENYING THE WRIT

### PETITIONERS' CLAIMS FOR EXTRA-CONTRACTUAL COMPENSATORY DAMAGES MAY NOT BE MAINTAINED UNDER ERISA.

Within days after petitioners filed this action, respondents informed them they would be paid their benefits in full, and these payments were entirely completed within a few months. Nonetheless, petitioners continued to pursue this lawsuit, pressing a claim for compensatory damages allegedly resulting from the delay in payment of their distributions.[2] The gravamen of the petition is this claim for compensatory damages for the benefit claims.

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2. Petitioners also sought punitive damages, and a discretionary award of attorney's fees and statutory penalties. Petitioners' claim for punitive damages was properly stricken by the District Court. (App. Ex. 11, at 1-2). Citing *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985) and *Kleinhans v. Lisle Sav. Profit Sharing Trust*, 810 F.2d 618 (7th Cir. 1987), the District Court correctly ruled that punitive damages were not an available remedy under ERISA. App. Ex. 11, pp. 1-2; 956 F.2d at 660-661.

The Court of Appeals' determination that such relief is not available under ERISA is not only consistent with this Court's decisions and its own precedent, but also with all but one of the other Courts of Appeals that have ruled on this point. Although ERISA's express provisions do not afford such a remedy, petitioners contend that a cause of action should be implied under either ERISA § 502(a)(3) or § 502(a)(1)(B), permitting beneficiaries to recover extra-contractual damages allegedly resulting from the delay in payment of their benefits.[3]

**I. Petitioners' Extra-Contractual Damage Claims Cannot Be Sustained Under ERISA § 502(a)(1)(B).**

Petitioners' contention that their extra-contractual damage claims may arise under § 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B), is contradicted by the clear language of that section:

> CIVIL ENFORCEMENT.
>
> (a) PERSONS EMPOWERED TO BRING A CIVIL ACTION. A civil action may be brought—
>
> (1) By a participant or beneficiary—
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

---

3. Petitioners' claims may only be sustained under ERISA, as ERISA preempts all state laws insofar as they relate to an ERISA employee benefit plan, 29 U.S.C. § 1144(a); *Pilot Life Ins. Co. v. Dedeaux;* 481 U.S. 41 (1987); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).

The scope of § 502(a)(1)(B) is strictly limited (by the thrice-repeated phrase "under the terms of the plan,") to contract claims based upon or arising under the provisions of the plan. Claims for extra-contractual damages, such as the claims made by the petitioners herein, by their very nature fall outside the scope of § 502(a)(1)(B), because they do not arise under or depend upon the "terms of the plan." Rather, petitioners merely sought recovery in tort for alleged harm they claim resulted as a consequence of the delay in payment of their benefits.

Petitioners' claims under § 502(a)(1)(B) for benefits due under the plan were mooted at the inception of this lawsuit, when they received full payment of their benefits. Their accounts having been closed and their participation in the plan having terminated, petitioners were certainly neither seeking to "clarify [their] rights to future benefits under the terms of the plan" nor were they seeking to "enforce [their] rights under the terms of the plan." ERISA, § 502(a)(1)(B).

Indeed, any claim for extra-contractual damages, of necessity, must fall outside the scope of § 502(a)(1)(B). In *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 144 (1985), the plaintiff had been paid all the benefits to which she was entitled under the plan, but continued to press for compensatory damages for harm she allegedly sustained due to the temporary interruption in payment of benefits. This case reversed an appellate court holding allowing such damages, stating:

> Significantly, the statutory provision explictly authorizing a beneficiary to bring an action to enforce his rights under the plan — § 502(a)(1)(B), quoted supra, — says nothing about the recovery of extra-contractual damages, or about the possible consequences of delay in the plan administrators' processing of a disputed claim. Thus, there really

> is nothing at all in the statutory text to support the conclusion that such a delay gives rise to a private right of action for compensatory or punitive relief.

*Id.* at 144.

> We are reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA. As we stated in *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979): [W]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.

*Id.* at 147. Citing the above-quoted passages from *Russell*, the Fourth Circuit has held that extra-contractual damages are not an available remedy under § 502(a)(1)(B) as a matter of law. *Reinking v. Philadelphia American Life Ins. Co.*, 910 F.2d 1210, 1219-20 (4th Cir. 1990). This was the same analysis adopted by the Seventh Circuit in the instant case, 956 F.2d 655.

Because petitioners' extra-contractual damage claims fall outside the scope of the provisions of ERISA § 502(a)(1)(B), absent some other statutory basis under ERISA, the court below had no choice but to vacate the jury verdict and dismiss petitioners' damage claims.

**II. Petitioners' Extra-Contractual Damage Claim Cannot Be Sustained Under ERISA § 502(a)(3) Because It Is Neither a Claim for Equitable Relief, nor a Permissible Remedy Within the Structure of the Statute.**

Petitioners also contend that their claims for extra-contractual damages are sustainable under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) which provides:

CIVIL ENFORCEMENT.

(a) PERSONS EMPOWERED TO BRING A CIVIL ACTION. A civil action may be brought —

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

Petitioners contend that the extra-contractual damages they seek constitute "other appropriate equitable relief," within the meaning of this section.

The plaintiff in *Russell*, *supra*, having received full retroactive payment of all benefits to which she was entitled, nevertheless, brought suit under ERISA §§ 502(a)(2) and 409(a), 29 U.S.C. §§ 1132(a)(2) and 1109(a), for a breach of fiduciary duty, seeking extra-contractual and punitive damages allegedly resulting from a wrongful temporary interruption of disability benefits. Based on "the relevant text of ERISA, the structure of the entire statute, and its legislative hsitory," this Court held that no cause of action existed or could be implied under ERISA §§ 502(a)(2) and 409(a) for the recovery of extra-contractual or punitive damages caused by improper or untimely processing of benefit claims. *Russell*, at 148.

While *Russell* did not require a ruling whether a claim for extra-contractual damages might be sustained under ERISA § 502(a)(3), much of the reasoning in its holding that such a claim cannot arise under §§ 502(a)(2) and 409(a) applies equally to the statute as a whole and in particular to ERISA § 502(a)(3). In light of ERISA's carefully crafted remedial scheme, the complete

absence in § 502(a) of any mention of extra-contractual damages demonstrates Congress' deliberate intent not to afford such a remedy, *Russell,* at 144-148.

Because any damages or personal liability for breach of fiduciary duties may only inure to the benefit of the plan, ERISA § 409, the beneficiaries themselves are not permitted to recover any damages suing in their individual capacities. Thus, it is apparent that Congress is primarily concerned with protecting the integrity of the plan rather than sacrificing the group's security to the claims of the individual beneficiary. *Id.* at 144. That ERISA § 409 only provides plan-related remedies for breach of fiduciary duty offers a further indication of Congress' intent not to afford a private cause of action for extra-contractual damages to beneficiaries suing in their individual capacities. *See Sokol v. Bernstein*, 803 F.2d 532, 537 (9th Cir. 1986).[4]

Petitioners attempt to characterize their claim as one for "other appropriate equitable relief" under ERISA § 502(a)(3). However, compensatory damages are a classic form of legal relief, rather than a form of "appropriate equitable relief." In *Sokol v. Bernstein, supra,* the Ninth Circuit held that no cause of action for extra-contractual damages exists under § 502 as "other appropriate equitable relief."

> *Despite Justice Brennan's reservations, See Russell,* 105 S. Ct. at 3097 n. 10 (Brennan, J., concurring in the judgment), *it appears that Congress used the word "equitable" to mean what it usually means — injunctive or declaratory relief.* The above-quoted definition of "appropriate equitable

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4. A decision neither cited nor discussed in *Carich v. James River Corp.*, 958 F.2d 860 (9th Cir. 1992), upon which petitioners place great emphasis.

> relief" [from the Senate Finance Committee's report on ERISA] lists three distinct remedies (injunction, constructive trust, and removal), all of which are closely tied to the plan. *For us to add an extra-contractual remedy to a list of remedies so strongly contractual in nature would be to step beyond the province of the judiciary and into that of the legislature.*

*Sokol*, 803 F.2d at 537-38 (emphasis added). The Seventh Circuit here adopted the same reasoning, as well as that of its own decision holding punitive damages impermissible in such cases, *Kleinhans v. Lisle Sav. Profit Sharing Trust*, 810 F.2d 618 (7th Cir. 1987), to limit any remedy to that specifically authorized by the statute in the plan, 956 F.2d at 657.

Likewise, the First Circuit has ruled that "other appropriate equitable relief" does not encompass a beneficiary's claim for extra-contractual damages, holding that "other appropriate equitable relief [under § 502] should be interpreted to mean what it says — declaratory or injunctive relief, not compensatory and punitive damages." *Drinkwater v. Metropolitan Life Ins. Co.*, 846 F.2d 821, 824-825 (1st Cir. 1988), *cert. denied*, 488 U.S. 909. Furthermore, in *Powell v. Chesapeake & Potomac Tel. Co.*, 780 F.2d 419, 424 (4th Cir. 1985), *cert. denied,* 476 U.S. 1170, the Fourth Circuit rejected that plaintiff's argument that beneficiaries may seek extra-contractual and punitive damages form a fiduciary as "other appropriate equitable relief" under traditional principles of trust law (which Congress intended to engraft upon ERISA), because "such relief is generally not available in an action by a beneficiary against a trustee for breach of trust" under the common law of trusts. More recently, the Eighth and Eleventh Circuits have taken the same position in *Novak v. Anderson Corp.*, 60 U.S.L.W. 2643, 15 E.B.C. 127 (8th Cir. 1992) and *McRae v. Seafarers' Welfare Plan*, 920 F.2d 819 (11th Cir. 1991). *See*

*also: United Steel Workers of America v. Connors Steel Co.*, 847 F.2d 707 (11th Cir. 1988); *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc.*, 793 F.2d 1456 (5th Cir. 1986); *Varhola v. Doe*, 820 F.2d 809 (6th Cir. 1987) (both holding punitive damages not available as "other appropriate equitable relief" under § 502).

These decisions are fully consistent with this Court's rejection of judicial expansion of ERISA's remedies or causes of action beyond those already granted by statute. Prior to *Russell*, that unwillingness to tamper with ERISA's carefully crafted remedial scheme was apparent in *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), (State lacked standing under ERISA § 502(a)(3) to enforce state tax liens on plan assets because § 502 does not permit suit by any party other than those expressly named.) Subsequent to *Russell, Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987) stated that ERISA preempted the plaintiff's state law tort and contract damage claims arising from the alleged improper processing of his benefit claim, again echoing *Russell's* "reluctance to tamper with" ERISA's enforcement scheme for fear of undermining the delicate Congressional balancing of interests which it embodies, *Pilot Life*, 481 U.S. at 53-54. *See also, Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).

The cases cited by petitioners as a conflict in the circuits deal with different problems in different ways. In *Warren v. Society National Bank*, 905 F.2d 975 (6th Cir. 1990), a money manager, (who was not a plan administrator like respondent here, but an outside expert hired as an asset custodian) failed to follow an instruction about the movement of funds, which the Sixth Circuit acknowledged was different from *Russell*, in part, because of "the nature of the alleged injuries and the relief sought", *Id.* 980. Moreover, every circuit which has reviewed that decision has, as did the Seventh Circuit here, declined to follow it because of its

reliance on a concurring opinion, rather than that of the majority, and because the reasoning of the *Russell* majority is more persuasive, 956 F.2d 658-659. The Ninth Circuit decision in *Carich, supra*, did not cite the *Warren* case.

Nor does *Carich* provide a remedy like that sought by petitioners here. Contrary to the suggestions on the petitioners, the court there only remanded the case for further proceedings as to the correct amount of a benefit based on its effective date, not whether extra-contractual damages are permissible, 958 F.2d at 862.

Neither does the Seventh Circuit's decision here conflict with that in *Ingersoll-Rand Company v. McClendon*, 498 U.S. ____, 111 S. Ct. 478, 112 L. Ed. 2d 474 (1990). There the issue was whether a state cause of action was preempted by the exclusive remedies of § 502(a), and this court held that such was the rule. The petitioners cite the following phrase in support of their position. "[T]here is no basis in § 502(a)'s language for limiting ERISA actions to only those which seek 'pension benefits'. It is clear that the relief requested here [which included the employee's reinstatement] is well within the power of federal courts to provide." *Ingersoll-Rand*, 112 L. Ed. 2d at 488.

Instead of applying these statements in the context of a preemption argument, the petitioners claim these two sentences conflict directly with the Seventh Circuit's holding (Pet. at 8). However, the Seventh Circuit, and every Federal Court of Appeals to consider this issue,[5] disagrees with the petitioners. The Seventh

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5. No Court of Appeals has held that the final paragraph of *Ingersoll-Rand* overrules *Russell*. The only other Court of Appeals which considered the issue held that the last paragrah of *Ingersoll-Rand* does not mean that future lost wages, mental anguish and punitive damages are available under ERISA. The Eleventh Circuit interpreted the last paragraph of *Ingersoll-Rand* (Cont'd)

Circuit summarized *Ingersoll-Rand* by saying "we are not rash enough to believe that the Court intended to overrule settled law in most of the circuits as well as narrowly limit, if not overrule its own decision in *Russell* in such an offhand manner" 956 F.2d at 660.

If this Court intended to extend the relief available under ERISA, it certainly would have done so explicitly. Such a departure from precedent would not have been relegated to a single sentence, in dicta at the end of an opinion focused exlusively on a different issue *Id.* at 660, quoting *Monfiletto v. John Hancock Health-Plans*, 1991 U.S. Dist. Lexis 15875, 5 (E.D. Pa. Oct. 30, 1991). The Seventh Circuit's decision does not conflict with any opinion of this Court, nor with that of any other circuit considering the same issue.

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(Cont'd)
in the context the statement was made. "The Supreme Court was stating that federal law provides relief for ERISA actions other than those that seek to recover pension benefits, such as the plaintiff's action for wrongful termination." *McRae v. Seafarers' Welfare Plan, supra* at 821, n. 7.

## CONCLUSION

One plaintiff has already declined to seek the writ. The others hang on to a single issue: whether they are entitled to more than their full benefits under the plan, in spite of a well-established statutory and case law authority which deny such additional payments. This Court's decision in *Russell* and the holdings of the Courts of Appeals relying upon that analysis would all prohibit this contortion of the statutory structure. A "sandbox spate" between members of a disintegrating law firm does not warrant the further consideration of this Court.

DATED: June 9, 1992

Respectfully submitted,

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